



November 11, 2016

**Re: Aurora City Council Actions Concerning the Public Defender's Office**

Dear Councilmembers,

On behalf of the Colorado Office of the State Public Defender and the National Association for Public Defense, we are writing to express our concerns about the proposed ordinance amending Chapter 50, Article II, Division 4 of the City Code of the City of Aurora regarding the Office of the Public Defender.

By giving the City Manager the power to hire and fire the Chief Public Defender and his/her assistants, we believe the city would be acting in direct conflict with the advice of the United States Supreme Court, and nationally recognized standards of public defense. Further, by removing from the (proposed advisory) commission any criminal defense attorney who practices in municipal court, the city would be eliminating from the commission persons with the necessary knowledge and skill to evaluate the competency of representation delivered by the office of the Public Defender.

The American Bar Association (ABA) has set forth "Ten Principles of a Public Defense Delivery System" as a "practical guide for governmental officials, policymakers, and other parties who are charged with creating and finding new, or improving existing public defense delivery systems".<sup>1</sup> The first principle is,

"THE PUBLIC DEFENSE FUNCTION, INCLUDING THE SELECTION, FUNDING, AND PAYMENT OF DEFENSE COUNSEL, IS INDEPENDENT."<sup>2</sup>

The commentary explains that counsel must be independent from political influence and subject to judicial supervision only in the same manner as retained counsel, suggesting oversight through a "nonpartisan board".<sup>3</sup>

The National Legal Aid and Defender Association (NLADA) also published "Guidelines for Legal Defense Systems in the United States", which state "[t]he defender system should be an independent agency."<sup>4</sup> Further, that: "Whether organized at the state, regional, or local level, the goal of any system for providing public defender should be to provide uniformly high quality legal assistance through an **independent** advocate."<sup>5</sup>

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<sup>1</sup> *Ten Principles of a Public Defense Delivery System*, American Bar Association (2002), at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf), see *Introduction*

<sup>2</sup> *Id.* at p.1

<sup>3</sup> *Id.*

<sup>4</sup> *Guidelines for Legal Defense Systems in the United States*, the National Legal Aid and Defender Association, at [http://www.nlada.net/sites/default/files/nsc\\_guidelinesforlegaldefensesystems\\_1976.pdf](http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf) at 2.18(a)

<sup>5</sup> See *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, The Constitution Project (2009), at <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> at page 186 (citing the NLADA guidelines).

Regarding Public Defenders, the U.S. Supreme Court stated, “An indispensable element of the effective performance of his responsibilities is the ability to act **independently of the government** and to oppose it in adversary litigation.”<sup>6</sup>

It is our understanding that the Aurora City Manager serves at the pleasure of the City Council, “who is elected by popular vote”.<sup>7</sup> The City Manager’s interest and primary obligation is to carry out policy enacted by council, who serve the city at large. A Public Defender’s express purpose is NOT to serve the city at large, but rather to zealously advocate for the undivided interests of his client.<sup>8</sup> These interests can be “unpopular”, they are directly adverse to the will of the City as represented by the City Attorney’s Office and the Police Department. This is why independence is so important; so that a conflict or even appearance of conflict does not occur in the management of this constitutionally mandated function.

We believe that placement of the Public Defender under City Management for purposes of hiring, firing and evaluation of the municipal public defender and all of the assistants (with no career service status) will effectively abolish the independence of the office and compromise the vital role that it plays in the fair administration of justice. If the concern is financial accountability, this can always be obtained through an independent budget process as obtained in other well-functioning public defense systems. And a public defender commission need not set salaries

The Colorado State Public Defender system was created as an independent agency by the Colorado General Assembly in 1970. C.R.S. 21-1-101 (1) provides, “The office of state public defender is hereby created and established as an agency of the judicial department of state government. The general assembly hereby declares that the state public defender at all times **shall serve his clients independently of any political considerations or private interests**, provide legal services to indigent persons accused of crime that are commensurate with those available to non-indigents, and conduct the office in accordance with the Colorado rules of professional conduct and with the American Bar Association standards relating to the administration of criminal justice, the Defense Function.”

C.R.S. 21-1-101(2) creates a five-member public defender commission appointed by the Supreme Court with no political party granted more than three seats. C.R.S. 21-1-101(3) gives the public defender commission the power to appoint for a term of five years and the power to discharge the state public defender for cause. C.R.S. 21-1-102(4) clarifies that the members of the public defender commission serve without compensation but with reimbursement for expenses. (See also C.R.S. 21-1-103 for the “Representation of Indigent Persons” and 21-1-104 for the “Duties of the Chief Public Defender” which include the discretion to hire and fire employees and assistants.)

Therefore, it is the duty of the Colorado State Public Defender to ensure that all attorneys are serving their clients competently and acting in a manner consistent with the ABA Standards, the Colorado Rules of Professional Conduct and commensurate with legal services available to non-indigent clients. The commission supervising the State Public Defender is populated with skilled professionals without political agendas who can then properly evaluate whether the Public Defender is fulfilling his/her statutory mandate.

Further, it is important to note that oversight of the Colorado State Public Defender budget and staffing is accomplished through the Colorado Joint Budget Committee and must be approved by the state legislature. The budget is posted on the Office of the State Public Defender website to allow for the necessary transparency.

More recently, the City and County of Denver enacted an ordinance creating an office of the Public Defender that is also appropriately independent. Section 14-130 of the Denver Municipal Code created the “Municipal *Public Defender* Commission”, created within the Denver

<sup>6</sup> *Ferri v. Ackerman*, 444 U.S. 193, 204, 100 S. Ct. 402, 409, 62 L. Ed. 2d 355, 363, 1979 U.S. LEXIS 153, \*18 (U.S. 1979)

<sup>7</sup> See more at: [https://www.auroragov.org/city\\_hall/city\\_management#sthash.jwR1UwxL.dpuf](https://www.auroragov.org/city_hall/city_management#sthash.jwR1UwxL.dpuf)

<sup>8</sup> *Ferri v. Ackerman*, 444 U.S. 193, 204, 100 S. Ct. 402, 409, 62 L. Ed. 2d 355, 363, 1979 U.S. LEXIS 153, \*18 (U.S. 1979) and see *Polk County v. Dodson*, 454 U.S. 312, 318-319, 102 S. Ct. 445, 450, 70 L. Ed. 2d 509, 516-517, 1981 U.S. LEXIS 136, \*12-14 (U.S. 1981)

County Court. Section 14-131 provides for appointment of the Commission by presiding judge of the Denver County Court.

Both of these models provide a system where the Public Defender is appropriately insulated from political and judicial influence through the appointment of an independent commission with the sole purpose of selecting and monitoring the Chief Public Defender. The Chief Public Defender is then given the power to run his or her office independent of political and judicial influence, allowing them to perform the function of providing effective representation to the indigent. Budget accountability and transparency is achieved through the normal budgeting process of City Council and the State legislature.

A public defender plays a vital role in every judicial system to guarantee that the rights of the accused are protected as provided by the State and Federal Constitutions. We believe that it is of utmost importance to your city that you are guided by the standards that have been set out by the nation and the State of Colorado in the management of the Aurora municipal public defender's office. The proposed amendment flies in the face of best practices.

Thank you for your consideration. We are happy to provide any assistance that you might find valuable as you deliberate and define the structure of the Aurora Public Defender's Office.

Sincerely,



Douglas K. Wilson  
Colorado State Public Defender



Ernie Lewis, Executive Director  
National Association for Public Defense

## ON BEHALF OF THE NAPD STEERING COMMITTEE

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### **SENT VIA EMAIL**

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